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No. 97-___ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

JAMES GREER,

Petitioner,

v.

STATE OF LOUISIANA; RICHARD P. IEYOUB,
Attorney General, State of Louisiana,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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34 pp

QUESTION PRESENTED FOR REVIEW[1]

1. Whether a federal habeas corpus petitioner should be permitted to file a petition under 28 U.S.C. § 2254 when the sentence for the conviction he attacks has expired at the time he files the federal habeas corpus petition, if the petitioner was "in custody" at the time he filed his state application for habeas relief.

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[1] The names of all parties to this proceeding appear in the caption. See Rule 14.1(b) of the Supreme Court Rules.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, James Greer, respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on July 3, 1997.

OPINIONS OF THE COURTS BELOW

The order and the opinion of the United States Court of Appeals for the Fifth Circuit denying the petitioner's certificate of appealability is not reported, and is attached as Pet. App. A. The order of the district court denying petitioner's habeas application for lack of subject matter jurisdiction is attached as Pet. App. B. The report and recommendation of the United States Magistrate-Judge recommending that the petition for habeas corpus relief be dismissed is attached hereto as Pet. App. C.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

The opinion of the United States Court of Appeals for the Fifth Circuit denying petitioner's request for a certificate of appealability was issued on July 3, 1997. This Court has jurisdiction under 28 U.S.C. § 1254(1). See Supreme Court Rule 13.3.

STATUTORY PROVISIONS INVOLVED

1. The statute pertaining to habeas corpus relief in the federal district courts, 28 U.S.C. § 2254 provides, in pertinent part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

STATEMENT OF THE CASE

This petition presents an important question of federal criminal law which affects the rights of prisoners in state custody to seek and obtain federal habeas corpus relief. In this case, the United States Court of Appeals for

the Fifth Circuit, relying on this Court's decision in *Maleng v. Cook*, 490 U.S. 488, 491, 109 S.Ct. 488, 104 L.Ed.2d 540 (1989), affirmed the dismissal of Greer's habeas petition on the grounds that the district court had no subject matter jurisdiction over the 28 U.S.C. § 2254 petition because at the time of the filing of that petition, the petitioner's custodial sentence imposed for that sentence had fully expired. The court tacitly rejected Mr. Greer's argument that because he *was* in custody at the time he filed his *state* application for habeas relief, and because exhaustion of these state remedies is a prerequisite for federal habeas review, his federal filing should relate back to the date of the state filing for purposes of determining the "in custody" requirement.

Under the Fifth Circuit's strict interpretation of *Maleng v. Cook, supra*, state prisoners serving custodial sentences are unfairly denied federal habeas review when their sentences expire pending the exhaustion of any and all state remedies, particularly since such exhaustion of state remedies is a prerequisite for federal review. Thus, these prisoners are in a difficult position of having to risk losing their right to federal review of their habeas claims by filing state post-conviction applications whose resolution may be preceded by the expiration of the sentence. Further, the recent additional requirement that this petitioner secure a "certificate of appealability" from the district court's dismissal of his 28 U.S.C. § 2254 petition only heightens the prejudice engendered by the strict interpretation of the "custody" requirement. The Fifth Circuit has recently interpreted the Anti-terrorism and Effective Death Penalty Act of 1996" to require that the request for a certificate of appealability first be submitted

to the district court, and, if denied, then to the Fifth Circuit Court of Appeals. These procedural requirements further extend the duration of a petition's pendency, and make more likely the possibility that at the time the petition is filed, the applicant may no longer be "in custody."

Factual Background:

In September of 1987, James Greer was arrested and subsequently charged by bill of information with four counts of sexual battery upon two juveniles. Greer initially pled not guilty, but subsequently changed his plea to not guilty, and not guilty by reason of insanity. On March 9, 1988, Greer was found competent to assist counsel and stand trial. On June 16, 1988, District Court Judge Tanner held a pretrial conference attended by Ms. Louise Draper for the District Attorney's office, and James Looney, an attorney for the Twenty-Second Judicial District Indigent Defender Program for the Parishes of Washington and St. Tammany. Mr. Looney attended on behalf of James Greer because Greer's counsel, Clarence P. Guillory, Jr., was unavailable.

Two alternatives were offered to Greer. He could plead guilty, without a pre-sentence report, and immediately receive five years of imprisonment. Alternatively, if Greer wanted a pre-sentence report, and submitted to psychiatric treatment, Judge Tanner would consider giving him probation. Under this second option, the maximum sentence Greer could receive would be ten (10) years imprisonment. Greer, however, did not accept

either of these two proposed options, and his trial began as scheduled on June 28, 1988.

After jury selection, however, and before opening statements, Greer was informed by his counsel, Clarence Guillory, that a plea agreement was still available. According to Greer, he understood that if "[he] would go along with the PSI investigation, [he] would get probation, and if [he] would agree to take psychiatric treatment, and . . . [he] understood that if [he entered his guilty plea at that time, yes [he] would [get probation]." Although Greer was informed that "probation was also conditioned upon a presentence investigation report", it was his "understanding" that "it [the presentence investigation report] would go in [his] favor, as [he] had no previous convictions and had psychiatric treatment [before]." Consequently, Greer entered a plea of guilty to counts 1, 2, and 4 of the bill of information under the provisions of *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). Only three days later, Greer attempted to have this plea set aside, filing a *pro se* Motion for Withdrawal or Setting Aside of Guilty Plea. The district judge denied that motion, without hearing, on July 19, 1988. On August 8, 1988, Greer was sentenced to six years hard labor on each count, the sentences to be served concurrently. At sentencing, counsel objected to the court's denial of the defendant's Motion to withdraw plea; counsel also moved for and was granted an appeal of Greer's conviction and sentence.

After an initial remand on August 10, 1989 for a hearing to determine the accuracy of the transcription of Greer's guilty plea on June 28, 1988, the First Circuit Court of Appeals for the State of Louisiana considered his

direct appeal, in proceedings #KA-90-0385. The following three assignments of error were made: 1) that the trial court abused its discretion and in failing to allow the defendant to withdraw his guilty plea prior to sentencing; 2) that the trial court abused its discretion in failing to allow the defendant to make a statement at his sentencing; and 3) that the trial court imposed an excessive sentence. Greer also filed his own *pro se* brief, containing fourteen assignments of error.

On direct appeal, the state appellate court considered and rejected the three assignments of error in counsel's brief, affirming Greer's conviction on December 18, 1990. Although the court mentioned the *pro se* brief, *State v. Greer*, 572 So.2d at 1169, 1170, the court considered only the assignments of errors raised in counsels' brief. The Court did remand the case to the district court with instructions to grant Greer credit for time served.

On September 27, 1993, Greer filed his petition for post-conviction relief in the district court, raising five claims of relief: 1) that his plea of guilty was not knowing or intelligent, and no basis for the plea of guilty was given by the State; 2) that the refusal to allow him to withdraw his plea was an abuse of discretion rising to the level of a constitutional error, denying him due process; 3) ineffective assistance of counsel; 4) violations of his right against self-incrimination under the Fifth Amendment; and 5) that the State failed to honor its plea agreement. In its response, the district attorney noted that Greer was not "in custody" having completed his sentence.

On December 31, 1993, without a hearing, the district judge ordered a dismissal of the application for post conviction relief after the district attorney's answer. The district court considered only claims one and four, despite having determined that Greer was no longer in custody, and denied those claims on the record and the pleadings.

Thereafter, Greer filed a motion for partial reconsideration with regard to the district court's determination of his custody status. On January 31, 1994, Judge Fitzsimmons recused himself, *sua sponte*, on the grounds that he was employed by the District Attorney's office on June 28, 1988, the date upon which Greer entered his guilty plea. The matter was allotted to Judge Coady of section "F", 22nd Judicial District.

On March 2, 1994, Judge Coady ordered the district attorney to supplement the record to verify the date on which Greer was released from custody. On March 8, 1994, the District Attorney supplemented the record with documentation purporting to show Greer having been transferred to inactive status as of September 25, 1993, or two days before the filing of his post-conviction relief. In his response, however, Greer filed a copy of his "Verification of First Offender Pardon", dated October 12, 1993, which pardoned James Greer on that date, effective September 25, 1993. Thus, Greer's pardon was made retroactive, and his release from custody, effected on October 12, was dated retroactively as well.

On April 18, 1994, Judge Coady entered an order denying Greer's motion for partial reconsideration of the order of dismissal. Thereafter, Greer filed a notice of

intention to apply for a writ of review to the Louisiana Court of Appeals, First Circuit, and subsequently filed a timely petition for a supervisory writ, alleging that 1) the district court erred in concluding that Greer's guilty plea was knowingly, intelligent and voluntary; 2) the district court erred in determining that Greer was not in custody on September 27, 1993, the date upon which he filed his petition for post-conviction relief; and 3) the court erred in dismissing Greer's petition for post-conviction relief without an evidentiary hearing regarding two claims for relief which required a hearing for resolution. The First Circuit affirmed the district court's ruling on the constitutionality of the relator's guilty plea but remanded for reconsideration of the merits of the issues raised in the post-conviction relief application not considered by the district court. On February 6, 1995, after an evidentiary hearing, the district court denied Greer's application for post-conviction relief.

Thereafter, Greer filed an application for writs to the First Circuit Court of Appeals challenging the district court's denial of his petition. On August 11, 1995, the First Circuit affirmed the district court's decision and denied Greer's application of review.

Petitioner then filed a timely application for a supervisory writ to the Louisiana Supreme Court to review the August 11 judgment of the appeals court. On December 8, 1995, the Supreme Court denied his petition.

Having thus exhausted his state remedies, James Greer filed his petition for habeas corpus relief in district court for the Eastern District of Louisiana on October 22, 1996, pursuant to 28 U.S.C. § 2254. Under the provisions

of 28 U.S.C. § 636, that petition was referred to a Magistrate-Judge. On January 21, 1997, the Magistrate-Judge issued a Report and Recommendation, finding that because Mr. Greer was not "in custody" at the time he filed his federal habeas corpus petition, the court had no jurisdiction to entertain his application for habeas relief. Subsequently, Greer filed his Objections to the Report, and requested a *de novo* review of those findings. Judge Morey L. Sear, Section "G" of the United States District Court for the Eastern District of Louisiana, issued a memorandum and Order accepting the Magistrate's Report and Recommendations after reviewing the record, the applicable law, Greer's objections, and the Report and Recommendations. Thereafter, petitioner filed a timely notice of appeal on March 7, 1997, appealing the February 7, 1997 judgment to the Court of Appeals for the Fifth Circuit, and requested a Certificate of Probable Cause.

The District Court Proceedings:

On March 20, 1997, pursuant to the requirement of FRAP 22(b), Judge Morey J. Sear denied a certificate of probable cause, ruling that the petitioner had failed to meet his burden of showing probable cause to appeal. The court disagreed that *Carafas v. LaVallee*, 391 U.S. 234 (1968) and *Carter v. Procunier*, 755 F.2d 1126 (5th Cir.1985), cited by petitioner, supported the petitioner's interpretation of the "in custody" requirement because a close reading of those cases made clear that the courts therein were referring to federal petitions filed by the respective petitioners in their discussion of the "in custody" requirement. In *Carafas, supra*, this Court had held that a court's jurisdiction will continue over a habeas petition filed at

the time a petitioner is in custody pursuant to the conviction he attacks, even if the petitioner is released from actual physical custody before the complete adjudication of the application. Finding no other supporting authority for Greer's contention that his filing of a *state* habeas petition alleging identical constitutional issues raised in his federal petition, while he was in custody, should satisfy the jurisdictional requirement of custody, the Court denied the certificate. Thereafter, the petitioner requested that the Fifth Circuit Court of Appeals issue a Certificate of Probable Cause for Appeal, or Appealability, which Application for a Certificate of Appealability was filed on May 27, 1997.

The Court of Appeals for the Fifth Circuit's Opinion:

On July 3, 1997, the Fifth Circuit Court of Appeals issued an order denying James Greer a certificate of appealability, or COA, from the district court's dismissal of his 28 U.S.C. § 2254 petition, on the basis that the district court did not have federal subject matter jurisdiction because James Greer's sentence had fully expired at the time his federal petition was filed, and thus, he was not "in custody". The Court merely cited *Maleng v. Cook, supra,* for the proposition that a habeas petitioner is not "in custody" under a conviction when the sentence imposed for that conviction has fully expired at the time the petition is filed, and ruled that the district court was correct in finding that it had no federal jurisdiction over Greer's habeas claim. The court did not specifically address Greer's contention that *Maleng* should be interpreted to permit a federal habeas petitioner who was in custody at the time he filed the identical constitutional

claims in a state petition but no longer in custody at the conclusion of those proceedings to file a habeas claim "relating back" to the state filing.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

I.

THE FIFTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The Fifth Circuit's opinion does not delve into the relevant case law, as did Judge Morey Sear's denial of the certificate of probable cause at the district court level. Rather, the Court simply disposes of the issue by summarily citing *Maleng v. Cook, supra,* for the proposition that a habeas petitioner is no longer "in custody" when the sentence imposed for the conviction which he attacks has fully expired, and therefore, the federal district court lacks subject matter jurisdiction to review the petitioner's habeas claim.

The federal habeas statute gives United States district courts jurisdiction to entertain habeas petitions from persons who are "in custody" in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2241 (c)(3); *see also* 28 U.S.C. § 2254(a). This statutory requirement has been interpreted to permit filing of a habeas claim if the petitioner is: 1) in custody pursuant to the conviction he attacks; or 2) in custody pursuant to another conviction that is positively and demonstrably related to the conviction he attacks. 28 U.S.C. § 2241(d); § 2254(a),

(b); *Sinclair v. Blackburn*, 599 F.2d 673 (5th Cir.1979), *cert. denied*, 444 U.S. 103, 100 S.Ct. 684, 62 L.Ed.2d 656 (1980). Further, the court's jurisdiction will continue over a habeas petition filed at the time the petitioner is "in custody" pursuant to the conviction he attacks, even if he is released from actual physical custody before the application is finally adjudicated. *Carafas v. LaVallee*, 391 U.S. 234, 238, 88 S.Ct. 1556, 1559, 20 L.Ed.2d 554 (1968).

Maleng v. Cook does not preclude, by its holding, the petitioner's argument that the filing of his state habeas claim at the time he was in custody permits a federal district court to assert jurisdiction over a federal habeas petition that is filed after the defendant has been released from custody. Rather, *Maleng* held only that once the sentence imposed for a conviction has completely expired, "the collateral consequences of that conviction are not themselves sufficient to render an individual 'in custody' for the purpose of a habeas attack upon it." *Id.* at 492, 109 S.Ct. at 1926. While *Maleng* admittedly stands for the proposition that expiration of the sentence imposed for the conviction attacked in a habeas petition precludes federal subject matter jurisdiction, this Court was not confronted with the specific factual circumstances, and legal ramifications, of this case.

A strict interpretation of *Maleng* that under all circumstances, subject matter jurisdiction permitting a court to entertain a habeas petition would not lie where the petitioner was not in custody under the conviction which he attacks, or not in custody under a sentence enhanced by the conviction he attacks, ignores the salient fact that Mr. Greer's inability to obtain federal review of his constitutional claims on habeas relief is directly related to, if

not the product of, the requirement that he first exhaust his state remedies. 28 U.S.C. § 2254(b) and (c) preclude federal review of a habeas petition prior to the exhaustion of remedies available in the courts of the State:

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the Courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

James Greer had filed state habeas claims while in custody for the conviction and sentence under attack, and raised in those petitions federal constitutional claims that now are reasserted in the federal habeas petition. Some of these same claims had been raised in direct appeal *prior* to the state post-conviction relief application as well, and in his original Motion to Withdraw Plea. Exhaustive litigation in the state fora of these constitutional claims relating to the plea he entered in *1988* was a prerequisite to the filing of the federal petition. In the interim, Greer's custodial sentence expired, as he was pardoned on October 12, 1993, effective retroactively to September 25, 1993.

Thus, Greer's exhaustion of state remedies deprived him of his right to bring a federal habeas petition before a

federal court, as the delay occasioned in bringing these actions and awaiting judicial resolution resulted in petitioner's filing his federal habeas petition after his release from custody. Under the Magistrate-Judge, district court Judge, and Court of Appeals' interpretation of the *Maleng* rule, James Greer cannot bring a federal habeas petition because he was not "in custody" at the time the *federal* petition was filed, despite the fact that he was in custody when he pursued his direct appeal, and when he filed his state post-conviction relief application alleging the constitutional claims now set forth in his federal petition. Resolution of the state habeas claims from the district court level to the Louisiana Supreme Court was and is required by both the case law and the statutory language of the federal habeas statute. *See* 28 U.S.C. §§ 2254(b) and (c).

While *Maleng v. Cook, supra,* clearly reined in the liberal construction of the "in custody" requirement for the Great Writ, this Court cannot have intended the result obtained by Greer's strict adherence to the procedural rules in the instant case. As the law of the Fifth Circuit now stands, the requirement that all available state remedies be exhausted before a federal district court may entertain a habeas petition clearly precludes a petitioner's obtaining a federal forum for constitutional grievances when the term of custody expires before final resolution of the state claims, as in this case. *See Hendrix v. Lynaugh,* 888 F.2d 336 (5th Cir.1989); *Thompson v. Collins,* 981 F.2d 259 (5th Cir.1993). Thus, a habeas petitioner's ability to file federal claims depends in part on the calendars of state district and appellate courts, and the expedient resolution of their claims. The timely resolution of these state court remedies would also depend, to

a certain extent, on the good faith of the government in promptly responding to appeals and post-conviction applications. Finally, the very nature and quantity of a petitioner's claims could affect the length of time necessary for exhaustion of his state remedies.

Petitioner urges that the *Maleng* rule that a petitioner must be "in custody" at the time the petition is filed should be interpreted to permit a habeas petitioner who was in custody at the time the constitutional claims were first raised in a *state* petition but no longer in custody at the conclusion of those proceedings to file a habeas claim, "relating back" to the state filing.

The narrow interpretation of *Maleng, supra,* to require custody at the time of filing the first federal habeas petition, in conjunction with the requirement that all state remedies be first exhausted, creates a serious inequity. This rule deprived Greer of his federal forum, and will deprive other petitioners whose exhaustion of state remedies is prolonged and occasioned by delay, either from a crowded docket, government continuances, or other arbitrary factors. Habeas petitioners are thus prejudiced without cause from federal review of identical constitutional claims.

Due process, a sense of fundamental fairness, and the principle of equal protection are all implicated by this denial of the federal forum. Other litigants whose state remedies are adjudicated more expediently by the judicial system, and are still in custody at the time the federal petition is filed, are given the opportunity and the right to litigate those claims again in federal court. Further, petitioners whose state remedies are more limited than

those available to Greer would naturally be able to progress more rapidly to federal habeas review, as those state remedies would be more quickly exhausted. Greer's journey through the state appellate system was truly a choice between the Scylla and Charybdis: if Greer did not pursue final resolution of the constitutional claims in state court, through available state remedies, his eventual federal petition would not be accepted; and in so pursuing his state remedies, Greer lost his right to litigate those constitutional issues in a federal habeas claim because he was released from custody prior to the final resolution of his state post-conviction relief application.

THE COURT SHOULD RESOLVE THIS ISSUE

The importance of the writ of habeas corpus cannot be overstated. The habeas jurisdictional statute now interpreted to deny Greer his right to habeas review was meant to implement the constitutional command contained in Article I, Section 9, that the writ of habeas corpus be made available. *Jones v. Cunningham*, 371 U.S. 236, 238, 83 S.Ct. 373, 374 (1963). The inequity of requiring a federal habeas petitioner to first exhaust all state remedies, risking the chance that his "in custody" status may be extinguished by the time those state remedies are exhausted, cannot be tolerated. The fundamental unfairness of a rule that will result in an arbitrary denial of the right to federal habeas review for similarly situated habeas petitioners may well present a violation of the equal protection clause as well. This petitioner's claims are of constitutional magnitude, and deserving of a federal forum. He has been denied the right to federal

habeas review simply because his custody expired before the final adjudication of his state post-conviction application. Similarly situated petitioners whose remedies were more limited, or whose claims were more expediently adjudicated, such that they were yet in custody at the time that the federal petition was filed, were not denied federal habeas review, and could properly attack the validity of those convictions. Despite the serious collateral consequences of his conviction, James Greer cannot have federal habeas review of his constitutional claims unless he were to be arrested, convicted, and imprisoned yet again on another charge where that sentence is enhanced by the conviction he now seeks to challenge.

CONCLUSION

Wherefore, for the foregoing reasons, this Court is respectfully urged to grant Greer's petition, and to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in the instant proceeding.

New Orleans, Louisiana

Dated: September 30, 1997

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-30332
USDC No. 96-CV-3467

JAMES GREER,

Plaintiff-Appellant,

versus

STATE OF LOUISIANA; RICHARD P. IEYOUB, Attorney General, State of Louisiana,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

(Filed July 3, 1997)

ORDER:

James Greer requests a certificate of appealability (COA) from the district court's dismissal of his 28 U.S.C. § 2254 petition. Greer contends that he was in custody when he filed his state application for habeas relief, and he should not be denied review by a federal court simply because he completed service of his sentence before he filed his federal habeas petition.

Greer was released from prison and fully pardoned before he filed his § 2254 petition. A habeas petitioner is not "in custody" under a conviction when the sentence

imposed for that conviction has fully expired at the time the petition is filed. *Maleng v. Cook*, 490 U.S. 488, 491 (1989). The district court correctly determined that it lacked subject matter jurisdiction over Greer's petition. *See id.* at 490-91.

Greer has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). Accordingly, COA is DENIED.

/s/ J L Wiener, Jr
JACQUES L WIENER, JR
UNITED STATES
CIRCUIT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JAMES GREER	*	CIVIL ACTION
VERSUS	*	NO. 96-3467
STATE OF LOUISIANA	*	SECTION "G"

MEMORANDUM AND ORDER

(Filed Feb. 6, 1997)

On October 23, 1996, petitioner James Greer filed an application for federal habeas corpus relief pursuant to 28 U.S.C. § 2254. Greer argues that habeas relief is warranted because (1) his guilty plea was accepted by the state trial court without an affirmative showing that the plea was made intelligently and voluntarily and (2) the guilty plea was tendered without any factual basis.

On January 22, 1997, Magistrate Judge Louis Moore issued his Report and Recommendation. The magistrate found that Greer was not "in custody" at the time he filed his petition for habeas corpus, that is, Greer's term of imprisonment and term of supervised release had expired. Accordingly, the magistrate found that the court lacks jurisdiction to entertain Greer's application for habeas corpus relief. *Maleng v. Cook*, 490 U.S. 488, 490-491 (1989).

On February 3, 1997, Greer filed his objections to the Magistrate's Report and Recommendation. Because Greer filed timely objections, I review *de novo* those findings to which Greer objects. 28 U.S.C. § 636(b)(1).

Discussion

In his objections, Greer concedes that he was not in custody at the time he filed his application for *federal* habeas relief, however, he states that he was in custody at the time he filed his original *state* habeas corpus petition. Greer argues that since he was in custody when he filed his state habeas corpus petition, federal jurisdiction is proper.

In *Maleng v. Cook*, 490 U.S. 488, 490-491 (1989), the Court stated,

> The federal habeas statute gives the United States district courts jurisdiction to entertain petitions for habeas relief only from persons who are "in custody in violation of the Constitution or laws or treaties of the United States". . . . We have interpreted the statutory language as requiring that the habeas petitioner be "in custody" under the conviction or sentence under attack at the time his petition is filed.

The petition to which the Court refers is the application for relief under the federal habeas statute, 28 U.S.C. § 2254; it does not refer to a petition for relief filed with the state court.

Since Greer was not "in custody" at the time he filed his federal petition for habeas corpus relief, the court has no jurisdiction over Greer's petition. *See Maleng*, 490 U.S. at 490-491.

After considering the record, the applicable law, the Magistrate's Report and Recommendations, and Greer's objections to the Findings, I accept the findings made by Magistrate Judge Moore and adopt them as my own.

Accordingly,

IT IS ORDERED that James Greer's application for writ of habeas corpus is DENIED for lack of federal jurisdiction.

/s/ Morey L. Sear
MOREY L. SEAR
CHIEF JUDGE

UNITED STATS DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JAMES GREER	CIVIL ACTION
VERSUS	NO. 96-3467
STATE OF LOUISIANA	SECTION "G"

JUDGMENT

(Filed Febr. 7, 1997)

Considering the written Memorandum and Order of the Court;

IT IS ORDERED, ADJUDGED, AND DECREED that the application of James Greer for writ of habeas corpus is denied for lack of federal jurisdiction.

New Orleans, Louisiana, this 7th day of February, 1997.

/s/ Loretta G. Whyte
LORETTA G. WHYTE,
CLERK

APPROVED AS TO FORM:

/s/ Morey L. Sear
MOREY L. SEAR
CHIEF JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JAMES GREER	*	CIVIL ACTION
VERSUS	*	NO. 96-3467
STATE OF LOUISIANA	*	SECTION: "G"(6)

REPORT AND RECOMMENDATION

(Filed Jan. 22, 1997)

This matter was referred to the United States Magistrate Judge for the purpose of conducting a hearing, including an evidentiary hearing, if necessary, and submission of proposed findings and recommendations for disposition pursuant to Title 28, United States Code, Sections 636(b)(1)(B) and (C), and, as applicable, Rule 8(b) of the Rules Governing Section 2254 cases.

Upon review of the entire record, the Magistrate Judge has determined that this matter can be disposed of without an evidentiary hearing. Accordingly, the Magistrate Judge issues this Report and Recommendation in accordance with the applicable law, thereby recommending that the instant application for federal *habeas corpus* relief be **DENIED** for lack of federal jurisdiction.

Background Facts

In 1988, petitioner, JAMES GREER, was convicted after a guilty plea to three counts of a four count bill of information charging him with sexual battery against two

juveniles, violations of La.R.S. 14:43.1[1] Petitioner attempted to have his guilty plea set aside but his motion was denied by the trial judge. Subsequently, petitioner was sentenced to six years hard labor on each count, sentences to be served concurrently. Greer's convictions and sentences were affirmed on appeal. ***State v. Greer,*** 572 So.2d 1166 (La. App. 1st Cir. 1990).[2] On September 25, 1993, petitioner was released from the custody of the State Department of Corrections, having served his sentence and having completed his parole. Petitioner automatically received a first offender pardon, thus restoring all of his rights of citizenship and franchise. *See,* Verification of First Offender Pardon at State Record Vol. 1.

On October 23, 1996, petitioner filed the instant application for federal *habeas corpus* relief. In this application, petitioner argues that (1) his guilty plea was accepted by the state trial court without an affirmative showing that the plea was made intelligently and voluntarily as required by ***Boykin v. Alabama,*** 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); and, (2) that the guilty plea was tendered without any factual basis therefore. A threshold issue which must be addressed before this Court considers the merits of petitioner's allegations,

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[1] Greer agreed to plead guilty after his trial had begun and a jury was selected but before opening statements were made to the jury.

[2] The state concedes that Greer has exhausted his available state court remedies by raising the issues raised in his federal *habeas* application before the state's highest court in an application for post-conviction relief. *See,* ***State v. Greer,*** 664 So.2d. 422 (La. 1995).

however, is whether there is federal jurisdiction over petitioner's application for federal *habeas* relief.

Petitioner Not "In Custody"

The federal habeas statute gives the United States district courts jurisdiction to entertain petitions for *habeas* relief only from persons who are "in custody in violation of the Constitution or laws or treaties of the United States." ***Maleng v. Cook,*** 490 U.S. 488, 491, 109 S.Ct. 1923, 1925, 104 L.Ed.2d 540 (1989); Title 28, United States Code, Section 2241(c)(3); Title 28, United States Code, Section 2254(a). In ***Maleng,*** the Court held "that once the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual 'in custody' for the purpose of a habeas attack upon it." 490 U.S. at 492, 109 S.Ct. at 1926.

The U.S. Supreme Court has interpreted the statutory language as requiring that the habeas petitioner be "in custody" under the conviction or sentence under attack at the time his federal petition is filed. *see,* ***Carafas v. LaVallee,*** 391 U.S. 234, 238, 88 S.Ct. 1556, 1560, 20 L.Ed.2d 554 (1968). The courts have construed "custody" liberally to include not only actual physical custody, but significant restraints on personal liberty as well. See e.g., ***Jones v. Cunningham,*** 371 U.S. 236, 243, 83 S.Ct. 373, 377, 9 L.Ed.2d 285 (1963) (release on parole satisfies custody requirement); and, ***Dawson v. Scott,*** 50 F.3d 884, 886 n. 2 (11th Cir. 1995) (petitioner on supervised release satisfies custody requirement).

The state record indicates that, as of the time petitioner filed the instant application for relief, he had finished serving his sentence and was no longer physically "in custody". Moreover, even interpreting the "custody" requirement liberally, petitioner had completed his parole as of September 25, 1993. The "Verification of First Offender Pardon" letter indicates that petitioner's offense was immediately pardoned effective September 25, 1993 and thus petitioner was not on parole or any form of supervised release thereafter.[3] Under ***Maleng,*** petitioner cannot bring his federal *habeas* claims because he was not "in custody" at the time he first filed his federal *habeas* petition.

Petitioner argues however, that the cases of ***Carafas v. LaVallee, supra,*** and ***Carter v. Procunier,*** 755 F.2d 1126, 1129 (5th Cir. 1985) "have long held that where a habeas petitioner was in custody at (sic) time he filed his original application for post-conviction relief, the court's jurisdiction continues over the habeas petition even though the petitioner has been subsequently released". Petitioner therefore asserts that the fact that he has been released from custody has no effect on this Court's jurisdiction. *See,* Petitioner's Reply to the State of Louisiana's Response in Opposition to Application for Habeas Corpus at p. 2. The flaw with petitioner's argument however, is that in ***Carafas*** as well as in ***Carter,*** the habeas

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[3] Although petitioner states in his brief that he was released on "parole" as of September 25, 1993, he presents this Court with no evidence that he was on parole at the time he filed his federal *habeas* application. The state record also contains no evidence that petitioner was still on parole as of October 23, 1996, the date the instant petition was filed.

petitioner had filed his *federal* habeas petition *before* he was released from custody. Petitioner only asserts that he filed *an* application for post-conviction relief, apparently referring to his state post-conviction efforts to have his conviction overturned.[4] However, the critical inquiry here is whether *federal* jurisdiction attached prior to petitioner's release from state custody – which it did not since petitioner's federal application was not filed until October 23, 1996.

Additionally, petitioner argues that he will suffer collateral consequences as a result of his 1988 conviction even though he is finished serving his sentence. However, as ***Maleng*** holds, collateral consequences alone are not enough to create federal *habeas* jurisdiction. 490 U.S. at 492, 109 S.Ct. at 1926. Whether one suffers collateral consequences is an issue relating to whether petitioner's claims would be moot *if* federal jurisdiction had already attached and petitioner was released while his application was pending and is not an inquiry critical to a determination of whether federal jurisdiction existed at the time of filing.

Finally, petitioner's allegation that he may suffer collateral consequences if he is subsequently convicted of another offense because his prior conviction can be used to enhance a subsequent sentence is of no moment. If petitioner is later convicted of another criminal offense, he can then attack his 1988 conviction through a federal application challenging the enhanced sentence received

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[4] Petitioner filed an application for post-conviction relief in the state courts on September 28, 1993. See, State Record Vol. 1.

in his subsequent conviction. *See, **Willis v. Collins,*** 989 F.2d 187, 189 (5th Cir. 1993); ***Allen v. Collins,*** 924 F.2d 88, 89 (5th Cir. 1991).

Conclusion

Petitioner was no longer serving his state sentence at the time he filed his federal *habeas* application nor was he subject to "significant restraints" on his personal liberty, such as parole, at that time. Therefore, under the applicable law, petitioner was not "in custody" when his application was filed such that federal jurisdiction would attach.

Accordingly, it is hereby recommended that petitioner's request for habeas relief pursuant to Title 28, United States Code, Section 2254 be **DENIED** for lack of federal jurisdiction.[5]

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within 10 days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. ***Douglass v. United Services Automobile Association,*** 79 F.3d 1415, 1430 (5th Cir. 1996).

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[5] Since the Court determines that there is no federal jurisdiction, it need not decide whether petitioner has named the proper respondent in his *habeas* application.

New Orleans, Louisiana, this 21st day of January, 1997.

/s/ Louis Moore, Jr.
LOUIS MOORE, JR.
United States
Magistrate Judge